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Supreme Court, U.S.
FILED

041010 JAN 13 2005

OFFICE OF THE CLERK

Docket No._____

In The

The U.S. Supreme Court

APPENDIX

To

Petition for Writ of Certiorari

Hilgers v. North Dakota

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Notes:

December 10, 2004

Supreme Court of North Dakota
Office of the Clerk
Mr. Douglas Hilgers
Re: State v. V. Hilgers
Supreme Court Number 20030169

This will acknowledge receipt of the electronically filed original and five copies of the Motion Stay of Mandate upon petition for certiorari reconsideration for Stay of Sentence/Judgment in the above matter.

The mandate in this matter was issued September 24,2004. Upon the issuance of the mandate, jurisdiction reverts back to the trial Court. Therefore, this court has no Jurisdiction or authority to act on your request.[1]

Sincerely
S/Penny Miller
Clerk
North Dakota Supreme Court

December 8, 2004

Supreme Court of the United States

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[1] The Petitioner has requested reconsideration due to the questionable authority of the Clerk, under spec Appellate Rule, to make jurisdictional decisions.

Office of the Clerk
Washington D.C. 20543-0001
Mr. Doug Hilgers

Re: Douglas Hilgers v. North Dakota
Application No. 04A495
Dear Mr. Hilgers

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on December 8,204 extended the time to and including January 13, 2005.

This letter has been sent to those designated on the attached notification list.
(Attached: The Supreme Court of North Dakota)

Sincerely,
William K. Suter, Clerk
By S/ Clayton Higgins
Case Analyst

***** December 3, 2004

A Pending, Determinative Petition

To the District Court
State of North Dakota
Ward County
Northwest Judicial District

Judge Gary Holum
Presiding Judge Robert Holt
Cc; Judge Gerald Rustad

A Petition To The Founding Civil Courts
In The Bifurcated Civil/Criminal Case

Under North Dakota Rules of the Court, Rule 62, For a new trial based upon newly exculped evidence, diligently pursued by the
Litigant and not available to the founding, Civil Court (Hilgers v. Hilgers 2002 ND 173, 653, NM 2d 79) Re: contempt/Sanctions/Orders/Custody Giving Rise to the Criminal Charge at issue;
The pendency of the Petition with the potential to leave the petition for review, moot.

In The Supreme Court
State of North Dakota

September 24, 2004

Re: State v. Hilgers
Supreme Court No. 20030169
Bottineau Co. No. 01-K-426

The mandate of the Supreme Court in this matter is being forwarded to the Clerk of Court of Bottineau County today. The opinion previously sent is now final.

Sincerely Yours
S/ Penny Miller
Clerk
North Dakota Supreme Court

In The Supreme Court
State of North Dakota

September 15, 2004

Re: State v. Hilgers

The Supreme Court entered and order today denying the petition for rehearing in this matter. Pursuant to Rule 41(a),N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the Clerk of the trial court after the expiration of seven days.

Sincerely
S/ Penny Miller
Clerk
North Dakota Supreme Court

Supreme Court of North Dakota
Office of the Clerk
September 10, 2004

M. Douglas Hilgers
RE; state v. Hilgers
Supreme Ct. No. 20030169

This will acknowledge the receipt of the original six copies of the petition for Rehearing in the above matter. The original was filed September 3, 2004, the copies were filed September 8, 2004. A copy of the petition has been distributed to each member of the Court. The disk of the petition for rehearing was received and filed in my office today.

Your petition for Rehearing does not comply with the Rules. It is well over 2,500 words, thew left hand margin is less than 1 1/2 inch, and only six copies were filed: however, I have been authorized to distribute your petition to the Court for whatever consideration the Court wishes to give it.[2],[3]

Sincerely,
S/ Penny Miller
Clerk
North Dakota Supreme Court

August 18, 2004
e-mail

The Court granted an extension to September 3 for filing the petition for rehearing. Here's the language of the letter: " The court considered your motion and an extension to September 3, 2004, has been granted for the Petition for rehearing under Rule 40, NDRAppP. Additional filings are not authorized under these rules."

From Penny Miller/Clerk N.D. Supreme Court

In The Supreme Court
State of North Dakota

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[2] It is notable that the Petitioner formally requested a relaxation of the Rules, under Rule

It is notable that the petitioner submitted the original copy + the 6 copies=7 copies, to meet the requirements of the Rules.

As sited, in the Rehearing petition, the asserted errors of fact, in the decision, were so encumbering, as to require extension past 10 pages.

The margin error, was clearly an error, leaving a 1 1/4, but clearly readable in the formal petition.

[3] **** It is not clear, in the rejection of the Petition, if it was rejected upon these technical grounds.

August 5, 2004

Re; State v. Hilgers
Supreme Court No. 20030169
Bottineau Co. No. 01-K-426

Enclosed is a copy of the Judgement entered in this case. The Judgement will be final upon disposition of a petition for rehearing, if any, or when the time for filing such petition has expired.

Sincerely,

S/ Penny Miller
Clerk
North Dakota Supreme Court

In The Supreme Court
State of North Dakota

August 4, 2003

Re: State v. Hilgers
Supreme Court No. 30020169

The Supreme Court entered judgement today in this matter wherein the criminal judgement is AFFIRMED. A copy of the decision is enclosed.

Under the N.D.R.App. P., a petition for rehearing may be filed within fourteen days from this date, during which period the mandate of the Court will be stayed. Petitions for rehearing should conform to the provisions of Rule 40, N.D.R.App.P.

Sincerely Yours
S/ Penny Miller

Clerk
North Dakota Supreme Court

In The Supreme Court
State of North Dakota

August 4, 2004

JUDGMENT
Supreme Court No. 20030169

Appeal from the district court of Bottineau County.

State of North Dakota Plaintiff and Appellee

v.

Douglas Hilgers Defendant and Appellant

This appeal having been submitted to the Court under N.D.R.App.P. 34(f), on the records and brief filed, at the December Term before:

Chief Justice Gerald W. VandeWalle, Justice William A. Neumann, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring, and Justice Carol Ronning Kapsner;

And the Court having considered the appeal, it is ORDERED AND ADJUDGED that the criminal judgement is AFFIRMED.

This judgement, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court.

Dated: August 4, 2004

By The Court
S/ Gerald V. VandeWalle
Chief Justice

Attest: s/ Penny Miller, Clerk

Filed By The Clerk if the Supreme Court Aug 4,2004

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2004 ND 160

State of North Dakota — Plaintiff and Appellee

v.

Douglas G. Hilgers — Defendant and Appellant

No. 20030169

Appeal from the District court of Bottineau County, Northeast Judicial District, the Honorable Donovan John Foughty, Judge

AFFIRMED

Opinion of the Court by Nuemann, Justice

Douglas Hilgers, pro se, 911 S. 72nd Avenue West, Duluth, Minn. , 55807, defendant and appellant, submitted on brief.

Robert p. Bennett, assistant attorney general, 600 E. Boulevard Ave., Bismarck, N.D. 58505-0040, for plaintiff and appellee; submitted on brief.

Nuemann, Justice

¶1 Douglas Hilgers appeals from the criminal judgement and sentence for the offense of removing or detaining a child in violation of a custody decree, a class C felony in violation of N.D.C.C. § 12.1-18-05. We affirm.

I

¶2 Douglas and Brenda Hilgers were divorced in 1998. They have four children, one of whom is a minor. The trial court awarded Brenda Hilgers custody of the minor child, and awarded Douglas Hilgers visitation. Brenda Hilgers currently lives in Bottineau, North Dakota, and Douglas Hilgers lives in Duluth, Minnesota

¶3 In June 2001, Douglas Hilgers removed his minor child from Bottineau, N.D. and moved the child to his home in Duluth, MN., Hilgers made several unsuccessful attempts to change custody in Minnesota. On September 13, 2001 the trial Court issued an order for the immediate return of the child, subject to contempt and other sanctions, including criminal charges, if Hilgers failed to comply. Hilgers did not comply with the Court's order, and a warrant was issued for his arrest. The minor child was eventually returned to his mother in late September 2001. Hilgers was subsequently arrested. Council was appointed at Hilger's initial appearance, but the appointment was later withdrawn when the trial court found that Hilgers was not indigent. A trial was held and the jury found hilgers guilty of removing his minor child from the state in violation of a custody decree. Hilgers appeals, raising approximately thirty-one issues relating to his conviction. Among his numerous issues, Hilgers argues (1) the trial court error3ed in finding he was not indigent; (2) the trial court erred in denying his request for a continuance; (30 the trial court erred in failing to issue all requested subpoenas; (4) the trial court erred in failing to issue his requested jury instructions; and 95) the trial court abused its discretion in the admission of testimony and evidence at trial.

II

A

¶4 Hilgers argues the trial court erroneously determined he was not indigent, and therefore, did not qualify for court-appointed counsel at public expense. Hilgers argues that he should have been granted counsel both during the trial and appellate stages of the case. We review the trial court's denial of appointment for counsel under the abuse of discretion standard. State v. DuPaul, 527 N.W.2d 238, 240(N.D. 1995).

> An abuse of discretion by the trial court is never assumed, and the burden is on the party seeking relief to affirmatively establish it. A trial court abuses it's discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it's decision is not a product of a rational mental process leading to a reasoned determination. The party seeking relief must show more than that the trial court made a "poor" decision, but positively abused the discretion it has under the rule.

Flattum-Riemers v. Flattum-Riemers, 2003 ND 70¶ 7, 660 N.W..2d 558(citations omitted)

¶5 " The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, § 12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel" Garcia v. State, 2004 ND 81, ¶5, 678 N.W.2d 568.

¶6 North Dakota Rules of Criminal procedure sets forth the right to appointment of counsel:

> Absent a knowing and intelligent waiver, every indigent defendant is entitled to have appointment at public expense to represent the defendant at every stage of the proceedings from initial appearance...through appeal in the courts of this state in all felony cases.

N.D.R.Crim.P. 44(a): DuPaul, 527 N.W.2d at 241

¶7 "There is no legal reason to appoint counsel for someone who can afford to obtain his own." DuPaul, 527 N.W.2d at 241. before counsel will be appointed , a defendant has the burden of establishing he is indigent and qualifies for appointment of counsel. State v. Schneeweiss, 2001 ND 120,¶ 10, 630 N.W. 2d 482.

¶8. On December 5,2002 the trial court removed Hilger's appointed counsel, finding Hilgers was not indigent"[b} based on a income of $31.000 gross per year and [Hilgers} claims that he transferred real estate to his children without consideration."

Hilgers contends the trial court erred in findings his assets, in the form of real property in Wisconsin, that disqualified him from appointment of counsel. However, the trial court does not appear to have adjudicated Hilgers indigent because he owns the property, as argued by Hilgers on appeal. Based on the record, it appears the trial court found Hilgers ineligible for counsel because he transferred the property without receiving consideration, not because he owned or had interest in the property. Clearly Hilgers own statements show that, at one time, he did own the property. Under our guidelines, the trial court, when determining indigency should consider;"[a] any indication that anticipatory transfer of assets by defendant to create the conditions for eligibility for defense services should be scrutinized and be dealt with decisively." N.D. Legal Counsel for Indigents Comm'n, N.D. Sup. Ct. Indigent Defense Procedures and Guidelines, Aug. 2002 at 1.2.

¶9. Additionally, in his application for court appointed counsel, Hilgers noted he earned approximately $31,000 per year. An individual with no dependants is eligible for indigent defense services if the gross annual income is at or below $11,075. N.D. N.D. Legal Counsel for Indigent's Comm'n, N.D. Sup. Ct. Indigent Defense procedures and Guidelines, Aug. 2002 at 1.4 While Hilgers would only be eligible for services, under the Guidelines, if there were at

least seven persons in his house hold, based on his listed income of $31,000. Under the Guidelines a person with a house hold of seven persons is eligible if his annual gross income is at or below $34,175, while a person with a household of six persons is eligible for services if his annual gross income is at or below $30,325. At most, six persons reside in Hilgers' household. Therefor, he would not qualify under the suggested annual gross income of the Guidelines.

¶ 10 In Hilger's Addendum to application for appointed defense Services, dated December 5, 2002, he stated

> " I own no real estate..... Mrs. hilgers, herself, requested that he Wisconsin home be given over to the four children....*********.(1998)..... I concluded as well, that it was appropriate .... I regularly seek the children's input on their interests and intentions. attempting, with the children's knowledge, to rent the property, to put toward the tax debt.....

We have reviewed the information before the trial court, specifically, hilgers' own claims that he transferred the property to his children, Hilgers' allusion to the fact that he retained control over the property, documents showing tax payments , listed income and other information contained in Hilgers' application. Because hilgers did not meet the burden of proving indigency, we conclude the trial court did not abuse its discretion in determining hilgers did not qualify for appointment for appointment of counsel during both the trial and the appellate proceedings.

B.

¶11. Hilgers also raises several other issues with regard to the indigency guidelines used by the trial courts within this state. according to hilgers, the criteria for establishing indigency are unpublished, available only to judges and counsel and, there for, unavailable to him. he claims that he is therefor unable to rebut criteria set forth in the guidelines. Hilgers also questions, on appeal, "is this issue of assets the

only criteria required to be evaluated in considering the assignment of appointed counsel, public or otherwise?"
¶12 There is nothing in the record to indicate Hilgers requested access to the indigency guidelines. in addition, we fail to see how the knowledge of the guidelines would have assisted Hilgers in meeting his burden of proving indigency. Hilgers presented all of his issues related to health, travel, occupation and a number of other factors be believed create exceptional circumstances in his case to the trial court. Despite this information, the trial court found Hilgers ineligible to receive indigent defense services.
¶13 With regard to Hilger's final issue regarding the criteria to be considered the guidelines provide consideration should be given to , "(10 income resources;(2) non-income resources ;(3) any extra ordinary financial conditions that would prevent the defendant from hiring an attorney; and (4) estimated cost of defense services." Legal Counsel for Indigent Defense Services Comm'n N.D. Sup. Ct. Indigent Defense Procedures and Guidelines, Aug. 2002, at 1.3 Additionally, the guidelines also provide list of "Exceptional Factors," to be taken into consideration, stating that,'[a] defendant whose income resources or non- income resources exceed these guidelines may still be eligible to receive legal assistance." Guidelines, 1.7 These factors include" age or physical infirmity of household members." Id.

C.

¶14 Hilgers argues his appointed counsel, later removed after the trial court determined Hilgers was not indigent,, was "negligent/ incompetent." Specifically, Hilgers argues his counsel failed to petition for review of the trial court's order removing him as counsel. Hilgers also argues appointed counsel was negligent, " having petitioned for; recusal and preserving his right to reassignment (one petition) well knowing that, upon review of the file, that Orders had already been issued. "We will treat Hilgers' issues as a claim if ineffective assistance of counsel.

¶15 On appeal, we reviewed the entire record when a claim of ineffective assistance of counsel is raised. State v. Lefthand, 523 N.W.2d 63, 69 (N.D. 1994). "If we can not readily determine that assistance of counsel was plainly defective and there exists no other grounds for reversal, then the defendant can later pursue his claim at post conviction proceeding where an adequate record can be developed." Id

¶16 To establish ineffective assistance of counsel, a petitioner must prove that his counsel's performance was so deficient as to fall below an objective standard of reasonableness and the counsel's deficient performance was prejudicial. Strickland v. Washington, 446 U.S. 668 (1984): Garcia, 2004 ND 81,¶5,678 N.W.2d 568 Generally, the second, or prejudice prong of the Strickland test can only be met if the defendant "establish[es] a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different." Syvertson v. State, 2000 ND 85,¶22,620 N.W.2d 362.

¶17 Hilgers has not demonstrated the "probable different result" that would have occurred, had his counsel petitioned for review of the trial court's order. see Lefthand, 523 N.w.2d at 70. Therefor, he has failed to demonstrate prejudice. After reviewing the entire record available to us, we can not determine counsel's performance was plainly defective.

III

¶18 Hilgers raised several evidentiary issues on appeal. Hilgers asserts the trial court erred in preventing him from offering impeachment evidence against Brenda Hilgers during the trial. Additionally Hilgers argues the trial court erred, causing Hilgers undue prejudice, by barring a witness from testifying: erred in refusing to issue subpoenas and allow out-of-state testimony: improperly referred, during his sentence hearing, to sealed files and incident involving his alleged locking of the family freezer: improperly interrupted him during his arguments at his sentencing hearing,

A.

¶19 Under Rule 10(b), North Dakota rules of Appellate procedure, an appellant is required to file a transcript with the Court on appeal. Christianson v. Christainson, 2003 ND 186,¶13, 671 N.W.2d 801. If the appellant fails to comply, he assumes the risks and consequences of such failure, Flattum-Riemers, 2003 ND 70,¶ 8, 660 N.W. 2d 558. A pro se litigant is not granted leniency solely because of his status as such. Id. We have repeatedly held, "we will decline to review an issue if the record on appeal does not allow a meaningful and intelligent review of the trial court's alleged error." Id.

¶20 Hilgers has not filed a transcript. Because we have not been provided a transcript, we are unable to provide a meaningful review of Hilgers' issues related to impeachment of his ex-wife's testimony, the trial court's reference to sealed files and the freezer incident during sentencing, Only a review of the transcript would allow us to fully consider each of the alleged errors, therefor, we conclude the above -listed issues are without merit.

¶21 We must address Hilgers' argument related to the trial Court's denial of witness from testifying and refusal of out - of-state testimony. in his brief, hilgers fails to state the identity of the witness nor does he offer the nature of the out of state testimony. Therefor we are unsure as to whether this issue was raised on the record before us, or solely during the course of the trial, for which we do not have a transcript. We will assume, however, that hilgers is referring to the trial court's refusal to allow a Minnesota social worker and Hilgers fiancée, residing in Minnesota, to testify by telephone.

¶22 We have recently addressed the issue of telephonic testimony in a criminal trial:

Under Rule 26, North Dakota Rules of criminal procedure, "In all trials the testimony of witnesses shall be taken in open Court, unless otherwise provided in statute or these rules." North Dakota case law does not address whether telephonic

testimony may be admitted at criminal trial. The civil rule equivalent, Rule 43, NDRCivP. requires testimony be taken orally in open court, but allows for deviation from the requirement under certain circumstances if all parties agree.

Because there is no precedent for such practice in criminal trials and such testimony appears to violate Rule 26, NDRCrimP, the trial court did not act arbitrarily, unreasonably, or capriciously in denying [the defendant's] request to allow [his witness] to testify by telephone. Additionally, even if the extended provisions of the civil rule were deemed applicable in this case, there was no agreement between the parties because the state objected. Therefor, the trial court properly refused to allow [the witness] to testify by telephone.
State v. Lemons, 2004 ND 44,¶¶ 10-11, 675 N.W. 2d 148. We have held that a "trial court has broad discretion in determining evidentiary matters" Id. at ¶ 12.

B.

¶ 24 Hilgers argues the trial court erred in denying several of his requested subpoenas to procure witnesses in his favor. According to Hilgers, " did the trial court error [sic] in canceling his subpoenas and not allowing them because the defendant had no funds for witness fees and other costs?"
¶25 Under the Sixth amendment of the United states Constituion, which applies to the states through the Fourteenth amendment, a criminal defendant "shall enjoy the right... to have compulsory witnesses in his favor." However we have stated that this is not an absolute right and "the defendant must show the testimony would have been favorable and material to his defense." Sate v. Treis, 1999 ND 136, ¶ 11, 597 N.W. 2d 664. " Whether the district court's refusal to issue a subpoena violates the sixth amendment is a question of law, and our standard of review for a violation of a constitutional right is de novo." Id.
¶ 26 The procedure for issueing subpoenas is set forth in Rule 17, NDRCrim.P.. Under Rule 17(b), NDRCrimP.:

Defendants Unable to Pay . The Court shall order at any time that a subpoena be issued for a service on a named witness upon an ex-parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the Court orders a subpoena to be issued, the costs incurred in the process and the fees of the witness so subpoenaed must be paid in the same manner in which similar costs and fees are paid in the case of a witness subpoenaed in behalf of the prosecution.

¶27 On February 21, 2003, the trial court informed hilgers that he "may petition the court ex-parte for subpoena of certain parties as witnesses at trial". The Court will sign the subpoena if you can show the court that the witness will have relevant testimony to give in your defense.....You will also have to request that because of the financial hardship the witness fees and service fees be paid by the state." The trial Court also enclosed a copy of rule 17 of the North Dakota rules of criminal procedure and a sample subpoena to assist Hilgers in his effort.

¶ 28 On March 5, 2003, the trial court Ordered the Clerk of courts to issue subpoenas to the following persons, as Hilgers requested, Robyn Engelstad; Cindy McIntee, Bottineau County Social services; Mary Rothman, Bottineau Co. Social Services; Bottineau County sheriff Steve Watson: Bottineau county deputy sheriff Sean Murphy. In this order, the trial court stated that, although Hilgers remained responsible for the expenses associated with the service and execution of a subpoena it would " insure that witness named be paid said expenses. The witnesses are to be give [sic] expense vouchers upon their appearance in court an said expenses will be paid by the Court". We also note Cyndi McIntee raised an objection to the subpoena prior to trial, but the Court still ordered her to appear, stating again that it would provide her with any expense and witness fees.

¶ 29 In another order, dated March5, 2003, the trial court denied four subpoenas, stating the subpoenas were not in compliance with rule 17, NDRCrim P.. The persons not required to appear under subpoena were: attorney Michael McIntee, BottineauCounty state's Attorney Swain Benson, District Court Judge Gerald Rustad, and Rollette County State's Attorney Mary Odonnell.

¶ 30 It does not appear to us, based on the record, that the subpoenas were denied because Hilgers was unable to afford witness fees and costs. Although hilgers correctly states the trial court denied several of his requrested subpoenas, the trial court did issue several of the requested subpoenas. On at least two occasions, the trial court stated it would ensure that all witness fees were paid. The trial court advised Hilgers he would need to comply with the requirements of Rule 17, NDRCrimP., before a subpoena would be issued. When the trial court determined Hilgers had failed to meet this requirement, it denied several suppeonas.

¶ 31 In State v. Treis, we held the trial court took reasonable steps to ensure the defendant was afforded due process, even thought the court would not issue subpoenas that failed to satisfy NDRCrimP., Rule 17. Treis, 1999 ND 136,¶ 12, 597 N.W.2d 664. In Treis, the trial court also required that before it would allow the defendant to issue a subpoena, " the defendant would have to present to this court in an n camera proceeding the factual basis that would make testimony of particular witness relevant before it would cause the state of North Dakota to be burdened with witness fees and costs." Id.

¶32. We come to the same conclusion, today. Hilgers was afforded due process despite the trial court's refusal to issue several subpoenas. A trial court is not obligated to issue every subpoena requested by a defendant. The record before us does not provide an adequate basis showing the testimony would have been both favorable and material to Hilger's defense. We can not conclude Hilger's Sixth amendment right to compulsory process was violated. Therefor, we

affirm the trial court's denial of Hilger's requested subpoenas.

IV

¶ 33. Hilgers asserts several grounds for error regarding jury instructions. Specifically, hilgers argues the trial court refused each of his requested jury instructions, and further failed to provide a basis for such refusal. According to Hilgers, the trial court erred in failing to provide several instructions, including instructions for: (1) legislative intent, (2) required intent, (3) his pro se effort, (4) a definition of "willful "and (5) the factual existence of the Uniform Child Custody Jurisdiction Enforcement Act, as set forth in NDCC § 14-14.1-15. Hilgers issue on appeal states, "Where as the trail Court permits reference to case law, in determining/answering questions re: Jury instruction, i.e. age of a child, reference to legislative intent is denied the defendant to answer questions? Did the court error?[sic]" Hilgers asserted the trial court was obligated to issue an instruction so as to not lead the jury to believe the defendant of such demeanor or poor judgement to do so.....[sic]"

¶ 35. We reiterate that our rules require an appellant to file a trial transcript and the consequences of failing to do so fall on the appellant. NDRCivP., 30(b); Christiansen, 2003 ND 186,¶ 13, 671 N.W.2d 801; Flattum-Riemers, 2003 ND 70, ¶8,660 N.W.2d 558. " we will decline to review an issue if the record on appeal does not allow a meaningful and intelligent review of the trial court's alleged error." Flattum v. Riemers, at ¶8.

V.

¶ 36 In his brief, hilgers seems to argue he was not afforded' review by a jury of peers." in North Dakota, we have a statutory scheme setting forth the proper method of both summoning a jury panel and challenging a jury panel. see NDCC ch.29-17. under NDCC§ 29-17-19,"[a] challenge to a panel can be founded only on a material departure from the forms prescribed by law in respects to drawing and return of the jury, or on intentional omission of the sheriff's summon

one or more of the jurors drawn." Additionally,"[a] challenge to a jury panel must be taken before the juror is sworn an must be in writing specifically plainly and distinctly the facts constituting the ground of the challenge." NDCC § 29-17-20. There is no transcript of the voir dire proceedings. Without a transcript, we can not provide meaningful review of the trial court's alleged error. Flattum-Reimers, 2003 ND 70¶ 8,660 N.W. 2d 558. We do not know the composition of the jury pool, nor do we know whether anyone was excluded an, if so, a basis for such exclusion. We are unable to determine whether the jury selection proceedings were prejudicial to Hilgers.

VI

¶ 37 On appeal, Hilgers argues the trial court erred in denying his request for a continuance. Hilgers moved for a continuance on March 4, 2003, and after trial court's denial on march 5, 2003, Hilgers moved for reconsideration on March 17, 2003 and again requested a continuance on March 21, 2003. According to Hilger's he showed good cause for a continuance because he did not have adequate time to prepare, despite his clear demonstration of "diligence in his pro se efforts." Hilgers also argues because there was an" irrational, unreasonable time constraint upon all process of the criminal accusation, far out of proportion to similar cases." We assume Hilgers again referring to the trial court's denial of his motions for continuance.

¶ 38 Under the North Dakota Rules of the Court, motions for a continuance will be granted only if the movant shows good cause. NDRCt 6.1(b) " We will not reverse a trial court's decision to deny a continuance absent an abuse of discretion." Interest of r.O., 2002 ND 154, ¶ 10, 652 N.W.2d 327.

¶ 39 In this case the trial court denied Hilger's request for a continuance because.

> [t]here exists no compelling reason to grant a continuance, the court recognizes the difficult task before the defendant in representing himself.

however, it is the Court's view that it is the defendant's refusal to use his resources to ire an attorney rather than indigency that places him in this predicament.

Based on the record before us, including the trial court's rational for denying Hilger's request, we conclude that the trial court did not act arbitrarily, unreasonably, or unconscionably in denying Hilgers' request for a continuance. We find no error in the trial court's decision.

¶ 40 In a related matter, Hilgers also argues that, after the "suspicious disappearance " of a cooperative witness, the trial court refused to grant a continuance to secure the presence of this witness. We presume that this request was made orally during trial because there is no evidence of this request in the record before us and Hilgers has not provided us with a transcript.

¶ 41 Without a transcript , we are unable to provide a meaningfull review of this issue we do not know if, in fact , hilgers requested such a continuance , or even whether the witness, who is not identified by hilgers on appeal, failed to appear. We cannot determine, based on the information before us, whether the trial court abused it's discretion in failing to continue the proceedings.

¶ 42 Hilgers argues the trial; court erred in failing to continue any of his challenges, despite Rule 12(b)(2), N.D.R/Crim.P. which states defects can be raised at "any time during the pendency of the proceedings," Hilgers misapplies this rule. This rule applies to "defects in the indictment, information, or complaint." Clearly, Hilgers arguments do not relate to the sufficiency of the charging document. This argument is without merit,

VII

¶ 43 Hilgers raised additional issues on appeal. We find these issues without merit.

VIII

¶ 44 The Judgement of the Trial Court is affirmed .

¶ 45 S/ William Nuemann, Mary Muehlen Maring, carol Ronning Kapsner, Dale Sandstrom, Gerald W. VandeWalle C.J.

Supreme Court of North Dakota
Office of the Clerk

August 19, 2003

Re: State v. Hilgers
Supreme Court No. 20030169 (Bottineau Co. No. 01-K-426)

This will acknowledge the receipt of the appellant's Motion for Extension of Time and Affidavit of Support. These were received and filed in my office August 18, 2003.

Your Appellant's Motion for Extension of Time was referred to the Court.

The Chief Justice requested that I reiterate to you that this Court does not directly appoint council nor do we grant preparation of transcript at public expense. The trial Court's denial of these matters are issues to be raised and briefed in your appellate brief.

Until we have confirmation whether your requested transcripts are being prepared, your request for an extension of time to file your brief to 40 days following the filing of the transcript is premature, however, at this time, the Chief Justice has granted an extension to September 19, 2003, for filing your brief.

As requested, I am enclosing a copy of this Court's Order denying the Petition for Stay of Execution of the Conviction and Sentence Pending Appeal.

Sincerely yours,

S/ Penny Miller
Clerk
North Dakota Supreme Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

September 17, 2003

Re; In Re Doug G. Hilgers

Dear Mr. Hilgers
The above-entitled petition for an extraordinary writ seeking unspecified relief was received September 16, 2003. The papers are returned for the following reason(s).[4]

(Nine enumerated)

Sincerely

William K. Suter, Clerk
By; s/ Clayton R. Higgins, Jr.

Supreme Court of North Dakota
Office of the Clerk

July 17, 2003

Mr. Doug Hilgers
Re: State v. Hilgers
Supreme Court No. 20030169
Bottineau Co.. No. 01-K-426

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[4] Notably, Upon presentation to the N.D. Supreme court, for good cause for Stay, Stay denied upon this petition.

Your undated letter, which was received in my office July 16, 2003, is being treated as a request for enlargement of time to file the Appellant's brief. Under North Dakota Supreme Court Administrative Rule 5, I am granting an extension to August 20, 2003, for the appellant's brief. This is the maximum extension I am authorized to give.

In regard to the trial court's apparent denial of the preparation of transcript at public expense, this is an issue you can raise in this appeal.

I note that you state: "I have other jurors to interview and depose." I am compelled to remind you this is an appellate review. The Court can only consider the record that was before the trial court. New information, testimony or exhibits can be considered in this appeal.

For you information, pattern jury instructions can be found on the internet at www.sband.org/pattern_jury_instructions/. This is a recent posting by the State bar Association of North Dakota.

Sincerely Yours
S/ Penny Miller
Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NNORTH DAKOTA

ORDER

On June 9, 2003 Douglas Hilgers filed a petition for Stay of Execution of the Conviction and Sentence Pending Appeal. On June 27, 2003 the state filed its Response resisting the Petition.

The Court considered the matter, and

ORDERED the petition for Stay of execution the Conviction and Sentence Pending Appeal is DENIED.

The Supreme Court of the state of North Dakota convened July 2, 2003 with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable William a. Nuemann, the honorable Dale V. Sandstrom, Justices, directing the Clerk of the Supreme court to enter the above order. The Honorable Mary Muehlen Maring and the honorable Carol Ronning Kapsner, being unavoidably absent, did not participate in this decision.

S/ Penny Miller
Clerk
North Dakota Supreme Court

State of North Dakota
In District Court
Northwest Judicial District
County of Ward

Brenda Hilgers
Plaintiff

v. Civil No. 98-C-0959

Douglas G. Hilgers
Defendant

ORDER

The Court, upon receipt of documentation from the defendant Douglas G. Hilgers, issues a temporary change of custody as it relates to Birch Hilgers, now residing with the Plaintiff Brenda M. Hilgers. A temporary custody order will be in effect immediately and the defendant is directed to immediately pick up his son and remove him from the situation he is presently in.

The plaintiff is given notice that the receipt of documentation from her a hearing will be scheduled.

Dated at Minot North Dakota this 2nd day of April, 2003

BY THE COURT

S/ Gary A. Holum
District Judge

IN THE SUPREM COURT
STATE OF NORTH DAKOTA

ORDER

March 12, 2003

Supreme Court No. 20030064
Douglas Hilgers
v.
The Honorable Donovan Foughty
Judge of the District Court

On March 7, 2003, Douglas Hilgers filed a petition for stay of proceedings and order of protection with attachments. The Court considered the matter, and

ORDERED, inasmuch as this is not appealable, the petition for stay is considered as a Petition for Supervisory Writ, the petition for supervisory Writ is DENIED.

The Supreme Court of the state of North Dakota convened March 12, 2003 with the honorable Gerald W. VandeWalle, chief Justice, the Honorable William A. Nuemann, The Honorable Mary Muehlen Maring, The Honorable Carol Ronning Kapsner, Justices, Directing the Clerk of the Supreme Court to enter the order. The Honorable Dale v. Sandstrom, being unavoidably absent, did not participate in this decision.

S/ Penny Miller
Clerk

North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

September 18, 2002
ORDER
Hilgers v. Hilgers Supreme Court No. 20010208

On September 17, 2002, Douglas G. Hilgers requested verbally, that his request for interim relief regarding the contempt order be renewed. The Court considered the matter
ORDERED, the relief requested is DENIED.
Convened September 18, 2002, the Honorable Gerald W. VandeWalle, Chief Justice, the honorable William a. Nuemann, the Honorable Mary Muhlen Maring, the honorable Carol Ronning Kapsner, Justices , V. Sandstrom unavoidably absent, did not participate in the decision.

S/ Penny Miller
Clerk
North Dakota Supreme Court

March 27, 2003

The Jury's Statement, Upon Impasse, as Approved by the Court

Upon verdict of the hung Jury, the approved statement of the trial Court, later confirmed removed from the record by Judge Fougthy.

" We the Jury, in the matter of State v. Hilgers, issue the following;

We find that we have grave concern for the health, safety, and welfare, of the child, Birch Hilgers, and that the system has failed
Him miserably."

April 14, 2003
Bottineau County North Dakota

Doug Hilgers
Re; Response to your letter of April/ 11/03
State v. Doug Hilgers
This letter is in response to your requests in letter we received today.

I have enclosed copies of the question that were asked of the Judge as the Jury was out deliberating. As to the statement that was read by the Jury foreperson, that was made part of the record in court and can be obtained through Wendy at judge Foughty's office (in form of a transcript). The hand written statement was not kept part of the file as per Judge Foughty's request.
Sincerely
S/ Rhonda Langehaug
Clerk of District Court

April 7, 2003

The Statement of the Jury Fore-person/ Mr. Dean Watson

On March 26th and 27th, 2003, I served on Jury duty in Bottineau County, North Dakota. The case we heard was a case involving Doug Hilgers and Birch Hilgers. Throughout the case Mr. Hilgers had difficult time introducing evidence that I feel could have made a huge difference in the case. We the jurors felt the system had let them down to include social services and local law enforcement. We felt that his son was not in a very good situation both physically and emotionally. We commented on this before the verdict was read. In fact I commented on this since I was the jury Foreperson for the Jury. We didn't feel justice was served and in fact only one piece of evidence lead to his guilty verdict. Judge Rustad had directed Mr. Hilgers to return Birch in 48 hours to North Dakota or he would face contempt of court and possible criminal charges. Doug's failure to comply with this was the only thing that kept us from a hung jury or a not guilty verdict. Our jury instructions told us only that we had to feel that Mr. Hilgers intentionally detained Birch, which in turn intentionally violated Mrs. Hilger's rights. Had these jury instructions included interstate law, which Mr. Hilgers provided me with after the trial he would have been found not guilty. The interstate law says that Minnesota had temporary jurisdiction if the child was in Minnesota and had been abandoned or it is necessary in an emergency to protect the child if the child is subject to or threatened with mistreatment or abuse. All of these conditions, we found to be true. We knew this and our consciences struggled with this through out our deliberations. I find it hard to believe that a parent can be prosecuted for trying to protect their own child. In addition, we found that both of the prosecution's witnesses to be unreliable and fraudulent. Their testimony was discounted entirely. As I said before, only one piece of evidence convicted Mr. Hilgers. In my opinion justice was not served. It seemed like some agencies tried to cover up and one person's personal vendetta was served. I've always thought that our children were most important and this boy's request to live with his father should have been granted long

ago. We were asked to use our common sense and it seems to me we were unable to do so. The court documents from earlier custody hearings clearly stated the boy's preference to live with his Dad. Why was this not granted? Common sense tells me that this all could have been avoided if that happened.

I feel that the court system and local agencies forced this man into a no-win situation. Who among would not do anything within their power to protect our children? Clearly his mother and a parent like that does not deserve children. She stated under oath that she would do anything for her Son but she would not go and get him. She violated her own rights by allowing Birch to leave Bottineau County. No where does it say that it was Doug Hilgers responsibility to return the Child. Therefore, common sense tells me it was both their responsibilities. Why is she not being prosecuted for abandonment? I do not profess to be knowledgeable about the law but I do know what is right and what is wrong. This is definitely wrong. The man's motives were clearly to protect his son and his temporary custody petitions that. Let's do something right here and overturn this conviction on appeal. I think he has suffered enough, don't you? I always thought our laws were meant to protect not punish those trying to protect, he's trying to protect his son's inherent rights ids no different than our troops trying to protect our inherent rights. I hope that you will do the right thing, as we were unable to. I felt terrible about this case and still do. Mr. Hilgers was able to get temporary custody within a week of this trial. That should tell you something. Please set this man and his son free.

Sincerely Yours
S/ Dean R. Watson
4-7-03

June 24.2003

From the partial transcript, At sentencing, May 28, 2003, as used by the State in contesting Petition for Stay of Judgement, N.D.Supreme Court brief, the appellee/Robert Bennett. pg 5, 8-19
(the Court)
"I However, I have gone through the past civil judgement based on the actions of your divorce; The finding of fact were that you were a very controlling individual. And in fact, in one instance they wrote down that you use to lock the freezer , so people didn't have access to it———"

August 19, 2003

State of North Dakota
Northeast Judicial District
Devils Lake, N.D. 58301
Chamber of Judge Foughty
Wendy Asperheim, Recorder

Doug Hilgers re; Letter for transcript June 29, 2003 and August 12, 2003 Bottineau Co. Criminal Case 05-01-K-426 S.c. No. 20030169

Dear Mr. Hilgers

I am in receipt of your letter dated July 29, 2003 concerning the request for transcript on appeal. This letter was received in my office on August 12, 2003. I also received a second letter dated august 12, 2003 which was received in my office August 18, 2003.

I cannot provide you with the exerpts from the transcript as you requested. Your request has not been made correctly pursuant to Rule 10 of the Appellate procedures(b)(1)(2)(3). An approximate cost for the partial transcript that you are requesting per your letters would be $997.50, which is just an estimate because you have not correctly set out the

number of copies needed pursuant to an appeal. The amount for a complete transcript is set out in my letter of June 16, 2003. Advance payment would have to be made before a transcript is completed.

I can not provide you with the other documents that you have requested. Those are no longer in the file, which is at the Supreme Court, nor can I prepare a transcript of proceedings before Judge e Ketterling. You will have to contact his recorder, Kathy Parrill for that estimate of transcript

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June 19, 2003
State of North Dakota
Northeast Judicial District
Devils Lake ,N.D.

The Chambers of Judge Foughty
Wendy Asperheim, Recorder

To Doug Hilgers Re: Bottineau Co, No 05-01-K-426 State v. Doug Hilgers

Dear Mr. Hilgers The Clerk of Bottineau Co has received a letter from you dated June 16, 2003 in which you make reference to; "It is now the time for the call for transcript." The letter was received and filed June 19, 2003 Pursuant to Appellate procedures the clerk has now transmitted your request. The notice of Appeal was filed June 11, 2003. The "Call for transcript " was filed separately on June 19, 2003. Pursuant to Rule 10 of appellate procedures you have not adequately set out what type of transcript you are requesting.

This is your notice of estimate of cost of the transcript preparation for the Jury trail held March 26 and march 27 th, 2003. The transcript would approximately be 363 pages @ a rate of $4.50 per page for five copies, plus $7.00 for shipping, and $5.00 disc for a total of $1,633.50. This amount would have to be paid in advance before the

transcript is prepared. You must send a money order made payable to V/ARS within 10 days of receipt of this notice or the transcript will not be prepared.
Sincerely S/ Wendy Asperheim

State V. Doug Hilgers: State's Requested Jury [5]Instruction,No.1
In addition to the standard opening and closing instructions

	NDJI No.
Out of Court Statements By Defendant	K5.14
Direct and Circumstantial Evidence	K-5.16
Proof of Intent	K-5.3

2003

NDJI-CIVIL[6]

K-1.20 Defendant Acting As Own Attorney

" In this case the Defendant is acting as his/her own attorney. He / She is entitled to do so. People who act as their own attorney are required to follow the same rules as an attorney would be required to follow. The Judge must be impartial and not assist either party.

February 10, 2003

State of North Dakota — In District Court
County of Bottineau — Northeast District
State V. Douglas Hilgers-Criminal Case No. 05-01-K-426

NOTICE SETTING JURY TRIAL

To Robert bennett, Asst. Attorney general

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[5] The Petitioner made written exception to the use of such pattern iinstruction and sighted the Supreme Court's caution re: authorization of such instructions-These instructions were "only available to Judges and Lawyers"

[6] The Petitioner's note: there was no commensurate , criminal Pattern Instruction at the time of trial nor was the defendant given notice of such.

Doug Hilgers, Pro se

NOTICE IS HEREBY GIVEN: That I am setting the above-entitled matter for jury trial on the 26th and 27th of March, 2003, beginning at 9:00 a.m. in the District Courthouse, Bottineau, North Dakota.

Any pre-trial motions under rue 12(b) NDRCrimP and/or notices under Rule 12.1and 12.2 of NDRCrimP should be completed and received by February 28, 2003.

In order to assist the court in the trial of the case. I would request both parties prepare a list of exibits, witnesses, and proposed jury instructions desired and submit a copy of the same to Devil's Lake by March 16, 2003. The originals should be filed with the Clerk of Court. A pre-trial telephone conference will be held February 28, 2003@ 9:00a.m. The Court will initiate the call. This is the final date for plea agreements, after that date the Court will only accept a dismissal or a guilty plea.

BY THE COURT

S/ Donovan Foughty

DISTRICT JUDGE

October 15, 2002

From: The States "Motion and Brief to Reconsider or Modify Approval of Appointment for Defense Counsel at Public Expence"Pg3¶3 " This motion is supported by the files and records of this case. At this time, the State requests that a hearing be held on the motion, at a time and place and in a manner the Court may direct."

United States Of America

In The Supreme Court

Hilgers V. North Dakota

On Petition for Writ of Certiorari

To The Supreme Court of North Dakota

The Petitioner: Declares, under the Laws of the United States and under penalty of perjury declares that his petition and the attending references and reformats represent his truthful and good faith efforts in a just representation of his cause.

In Pro Se
Doug Hilgers Doug Hilgers on January 7 ,2005
911 S. 72nd Ave. W
Duluth, MN. 55807
(218) 624-5855

Wendy J Wakefield 1-7-2005

WENDY J. WAKEFIELD
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2005